

informed decisions by weighing the pros and cons of consenting to the use and possible disclosure of their personal information.²⁶ Notices containing this information will advance the Act's goal to promote competition by better enabling subscribers to compare the CPNI information-handling practices of competing telecommunications services providers.²⁷ By promoting freer

²⁶ The costs of providing notice and obtaining subscriber consent are relatively small. Carriers can minimize costs of providing notice to subscribers by, for example, including inserts in billings and other mailings to subscribers. In addition, these costs may be offset by cost-savings that some carriers could achieve as a result of providing subscribers with notice. Anecdotal evidence from firms that provide notice to consumers regarding their intended uses of consumer information and response mechanisms for those consumers, suggests that these costs are minimal. In addition, some of these firms report that these processes render their mailings more targeted and thus more cost-effective.

²⁷ Notice should further advise subscribers that they may direct their existing carrier(s), in writing, to disclose their CPNI to designated third parties. Upon receiving written requests from subscribers, carriers must make such disclosure under the Act. See 47 U.S.C. §222(c)(2) (entitled "Disclosure on Request by Customers"). Of course, telecommunications carriers who receive CPNI, pursuant to a subscriber's written request, should also be required to notify subscribers about their CPNI handling practices before using or disclosing that information. See 47 U.S.C. §222(c)(1) ("a

(continued...)

flows of information, these measures will in turn enhance consumer welfare and improve carriers' abilities to compete.²⁸

B. The Form of Notice Should Maximize Subscriber Response Rates and Be Cost-Effective.

In the Notice, the Commission asks comments in what form -- oral or written -- carriers should have to notify consumers about how their information will be used and how they may control access to their CPNI.²⁹ Traditionally, written notice has been viewed as substantially better than oral notice, but that view may be changing as technology evolves.³⁰ NTIA therefore

²⁷(...continued)

telecommunications carrier that receives or obtains customer proprietary network information . . .") (emphasis added).

²⁸ See Comments of AT&T at 7 (asserting that a firms' ability to use CPNI will encourage development and marketing of other new telecommunications services).

²⁹ Notice, supra note 1, ¶28.

³⁰ Even though providing adequate notice will present costs to telecommunications carriers, NTIA believes it is essential to inform subscribers about the use of their CPNI and their rights regarding that information. Written notice has been thought to be preferable to oral notice because it would reduce the likelihood of omissions by the notice giver, afford a subscriber more time to

(continued...)

recommends that the Commission look to whether the form of notice meets two objectives -- maximization of subscriber response and cost-effectiveness -- rather than specifying that it be oral or written.

For notice to be effective, it must be designed to maximize subscriber response. Therefore, carriers should be required to provide notice in formats that are easily identifiable and understandable to subscribers and which they will not reflexively discard or disregard. But carriers should also be afforded the latitude to develop notice in the lowest-cost format possible so long as it is complete and will actually elicit response from those subscribers who would care to make known their views on whether they consent to the use of their CPNI.

³⁰(...continued)

deliberate about whether to consent, and provide subscribers with a record of their rights and courses of redress. The transition to an electronic world, however, may be changing that equation.

C. Subscribers Should Be Able to "Opt-Out" and Respond to
Notice In Other Cost-Effective, Flexible Ways.

The Commission should permit carriers to use "opt-out" consent. Under an opt-out approach, carriers could presume, absent a subscriber's objection within a prescribed time, that they could use CPNI for purposes identified in the notice.³¹ Opt-out consent gives subscribers who care about limiting the use of their CPNI the ability to do so while minimizing the burden on consumers who do not. It also minimizes costs for companies as well burdens on the free flow of information.³² Subscribers should not be restricted, however, from also contacting their carriers directly and affirmatively authorizing them to use CPNI in accordance with the terms and conditions of the carrier-provided notice.³³ In short, an "opt-out" approach would

³¹ See Privacy Report, supra note 9, at 25.

³² Many companies that do use opt-out forms of consent report that opt-out rates tend to be small -- in the three to five percent range.

³³ See Privacy Report, supra note 9, at 25; see also Comments of BellSouth at 18-20 (supporting NTIA's modified contractual approach in dealing with notice and consent issues). Although BellSouth supports NTIA's privacy framework, NTIA takes issue with BellSouth's
(continued...)

minimize the burden on subscribers, carriers, and the free flow of information.

To elicit greater responsiveness by subscribers to carrier-provided notice the Commission should also require carriers to permit subscribers to respond -- as flexibly as possibly -- to the notice provided. Allowing subscribers to express their decision flexibly increases the likelihood that subscribers will choose how they wish their personal information to be handled. For example, the carriers could permit subscribers to respond orally to carriers' 800 and 888 numbers as well as through simple "checks" on carrier-supplied reply forms.³⁴

³³ (...continued)

application of its privacy framework as it relates to BellSouth's proposed definition for "telecommunications service" under Section 222(c)(1). See supra, note 10 and accompanying text.

³⁴ Obviously, any such consent would also have to be provided by a date certain or it could obviate carrier efforts to use opt-out consent.

Subscribers should also be able to indicate with specificity which particular CPNI can be used, by whom, and for what purposes so that they can determine the precise levels of privacy protection they would like. For example, consumers should have the option to permit their carriers to use CPNI to market information about other services to them but to prohibit the sale of their CPNI to third parties.³⁵ Allowing this degree of specificity will maximize subscriber control over CPNI while also enhancing the ability of companies to use their customers' CPNI to market other services to them.³⁶

³⁵ At the same time, however, carriers must comply with Section 272 of the Act, which regards nondiscrimination requirements for Bell Operating Companies. If a Bell Operating Company shares CPNI with its Section 272 affiliate, it must also share the information with third parties, and if it is not willing to share the information with third parties, it cannot share it with its Section 272 affiliate, except as discussed supra in Part V at 34-35. See 47 U.S.C. § 272 (e).

³⁶ As stated in the Privacy Report, different standards should apply to sensitive information. See Privacy Report, supra note 9, at 25. Some CPNI may involve information that appears sensitive, e.g., calls to and from AIDS clinics, women's shelters, and adult hotlines. For this reason, the Commission should examine the extent to which CPNI includes sensitive information. To the
(continued...)

IV. STATES MAY IMPOSE ADDITIONAL CPNI REQUIREMENTS THAT DO NOT
CONFLICT WITH FEDERAL POLICIES.

The Commission seeks comment on the extent to which Section 222 permits States to impose additional CPNI requirements.³⁷ As noted above, NTIA believes Section 222 was intended to establish minimum nationwide CPNI requirements. States may therefore impose additional CPNI requirements that enhance but do not impede the Federal privacy and competition policies the provision embodies.

The 1996 Act creates a different regulatory scheme from that contained in the 1934 Act -- one that expands the applicability of national rules to historically intrastate issues and State rules to interstate issues.³⁸ Section 222 must be read in light of this new jurisdictional balance.

³⁶ (...continued)

extent the Commission concludes that CPNI involves sensitive information, NTIA believes that affirmative consumer consent should be required before this information is released. See id.

³⁷ Notice, supra note 1, ¶17.

³⁸ See 47 U.S.C. §§251-54.

The plain language of Section 222 also supports this interpretation. Section 222 does not distinguish between CPNI collected in connection with interstate and intrastate telecommunications services. It refers to all telecommunications carriers and thus plainly includes both interstate and intrastate carriers and services.³⁹ Congress was clearly able to make such distinctions in the Act where it wished to.⁴⁰ It is therefore reasonable to read Section 222 as establishing minimum national standards for use of CPNI to implement Congress' competitive and

³⁹ 47 U.S.C. §222. This reading of subsection 222(c) is supported further by subsection 222(e). Subsection 222(e) prescribes rules relating to the provision of subscriber list information by carriers providing telephone exchange service, which traditionally encompasses local service and comparable services. See 47 U.S.C. §153(47). As subsection (e) is structured as an exception to subsection (c), subsection (c) must clearly encompass both interstate and intrastate telecommunications services.

⁴⁰ See 47 U.S.C. §§251-254.

privacy policies.⁴¹ Accordingly, Commission preemption of conflicting State regulations is appropriate.

This reading is bolstered by the fact that Congress is charged with knowledge of the Commission's past preemption of conflicting State CPNI regulations (which was upheld by a Federal appeals court).⁴² It nonetheless chose not to reassess the Commission's authority.⁴³ Thus, Congress has tacitly endorsed the Commission's authority to preempt State CPNI regulations that conflict with Federal CPNI requirements.

⁴¹ Promoting privacy and competition are the twin goals of the Commission's regulations. See Conference Report, supra note 6, at 205.

We note that the overall thrust of the Act, as well as economic and technological trends, are eroding the traditional distinction between intrastate and interstate service and give further credence to this view of Section 222.

⁴² California v. FCC, 39 F.3d 919, 931033 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1427 (1995).

⁴³ The Commission preempted State privacy protections that interfered with its Federal CPNI regulations in 1991. See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order, CC Docket No. 90-623, 6 FCC Rcd 7571, 7631 (1991).

Even if the Act were not read to create a new jurisdictional partnership between the State and Federal governments, the 1934 Act clearly authorized the Commission to preempt State CPNI regulations that impeded the Commission's regulations.⁴⁴ For example, if a State defined "telecommunications service" more broadly than the Commission -- such as referring to "local, interexchange, or commercial mobile radio service" and the Commission had chosen the narrower definition we recommend -- a carrier could potentially use CPNI obtained from provision of one local service to market another local service. This result would conflict with both the competition and privacy policies embodied in the Act. It would skew the competitive playing field and deprive residents of that State of the privacy protections that

⁴⁴ The Commission may preempt a State regulation that impedes a valid Federal regulatory objective. See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986); National Ass'n of Regulatory Util. Comm'rs v FCC, 880 F.2d 422, 429-30 (D.C. Cir. 1989); Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990); California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1427 (1995); and California v. FCC, 75 F.3d 1350 (9th Cir. 1996).

Congress and the Commission sought to afford them. Under this analysis, too, the Commission may preempt State CPNI regulations that undermine the Commission's policies promoting privacy and competition. For these reasons, the Commission should preempt State regulations that impede rather than augment the Commission's requirements.

We note, however, that nothing bars States from taking further steps to improve competition and privacy with respect to CPNI in a manner consistent with the Commission's regulations. Indeed, State regulators have more direct knowledge of market developments and customers' expectations about privacy in individual communities. In addition, many States have been at the forefront of improvements in telecommunications competition and privacy regulation. So long as the Commission's fundamental CPNI requirements are met, such experimentation by the States with regulatory improvements should be welcome.

V. IN RESOLVING THE INTERPLAY BETWEEN SECTIONS 222 AND SECTIONS 272 AND 274, THE COMMISSION CAN FURTHER BOTH PRIVACY AND COMPETITION POLICIES BY ENSURING CUSTOMER CONTROL OF CPNI THROUGH ADEQUATE NOTICE AND CONSENT.

In its February 20, 1997 Request for Further Comment,^{45/} the Commission asks a number of specific questions concerning the relationship between Section 222 and the non-discrimination and joint marketing obligations of Bell Operating Companies (BOCs) under Sections 272 and 274 of the Act. In answering these questions, it is important to bear in mind that Congress intended the 1996 Act to further competition generally and Section 222 to enhance privacy as well as competition.^{46/} NTIA suggests that the general principles it has articulated in interpreting Section 222 offer the Commission guidance in resolving many of the questions posed by the Commission in its Further Request. More specifically, NTIA believes Congress' goals can be reconciled without undue burdens on consumers or carriers and without sacrificing privacy or competition policies by providing

⁴⁵ Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking, FCC Public Notice, CC Docket No. 96-115, DA 97-385 (Feb. 20, 1997).

⁴⁶ See Conference Report, supra note 6, at 1, 205.

consumers with full and adequate notice and an opportunity to consent to use of their CPNI.

The Commission's Non-Accounting Safeguards Order makes clear that CPNI is subject to the nondiscrimination requirement of Section 272(c)(1).^{47/} Thus, to the extent CPNI is made available to a BOC's affiliate, it must also be made available to unaffiliated companies on the same terms and conditions as it is made available to the affiliated company. Under NTIA's narrow reading of "telecommunications service" in Section 222, a BOC would have to provide notice and obtain customer consent whenever it provided information to its affiliated company in any event.^{48/}

⁴⁷ Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, ¶222 (Dec. 24, 1996),

⁴⁸ See supra, Part II.A at 9-14, Part III.A at 19-22. By its very nature, a carrier's affiliate provides a different type of "telecommunications service" than the carrier itself. (If it were providing the same service, no affiliate would be required.) As Section 222 allows access to and use and disclosure of CPNI only for the telecommunications service in which it was derived,

(continued...)

The Commission can minimize the impact of the nondiscrimination provisions of Section 272 on a customer's privacy by allowing consumers to determine whether they want CPNI to be made available in these circumstances.

Specifically, the Commission's rules can require that when a carrier seeks consent to provide information to its affiliated companies, the same notice must also inform consumers that if they consent to having their CPNI provided to a carrier's affiliate, the requesting carrier would also have to provide their CPNI to other nonaffiliated companies on the same terms and conditions. For the most part, customers could register their consent by "opting out." Where they wished to provide their CPNI to a carrier's affiliated company but withhold it from non-affiliated companies, however, they would have to provide an affirmative written response to the requesting carrier indicating their views.

⁴⁸(...continued)

notice and consent would be required before a carrier could share CPNI with an affiliate. See 47 U.S.C. §222(c)(1).

Such notice would place control over CPNI in consumers' hands and appropriately balance competition and privacy policy. Under this approach, consumers would be able to determine the level of privacy they want and whether they want to receive marketing materials for other services not only from affiliated companies, but also from unaffiliated companies. At the same time, nonaffiliated companies would for the most part enjoy the same access to CPNI as affiliated companies. As noted above, where the carrier originates the disclosure of CPNI, customer approval would be governed by Section 222(c)(1) and opt-out consent for the most part would be sufficient.^{49/} As long as

⁴⁹ Section 222(c)(2) requires that a carrier "shall disclose customer proprietary network information, upon affirmative written request by the customer..." (emphasis added) while Section 222(c)(1) is silent as to the requisite form of a customer's approval. Section 222(c)(2) deals with customer initiated requests for disclosure for CPNI and makes such disclosure mandatory, while Section 222(c)(1) deals with carrier initiated disclosures that are permissive. Given these distinctions, there is no basis for concluding that the same type of consent is required for both provisions and that a customer must also provide affirmative written consent before a carrier may disclose CPNI under Section 222(c)(1). Congress clearly distinguished between the two types of disclosure, specifying affirmative written

(continued...)

customer control over CPNI is maintained through the provision of adequate notice and opportunity for consent, NTIA believes that both the privacy and competition policies embodied in Section 222 can be reconciled with the nondiscrimination and joint marketing policies of the Act.

⁴⁹(...continued)

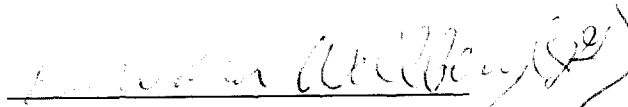
consent under Section 222(c)(2) perhaps as a means of ensuring that such information was indeed transmitted when requested by a customer. Given that disclosures under Section 222(c)(2) are customer-initiated, NTIA would also conclude that if a customer requests disclosure to a company affiliated with the carrier, CPNI would not have to be provided to unaffiliated companies pursuant to that request. The Commission would, however, have to be vigilant about the potential for carrier manipulation in such instances.

VI. CONCLUSION

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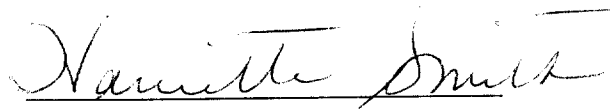
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